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ILLINOIS COMMERCE COMMISSION  
On Its Own Motion

Requirements governing the form and content : Docket No. 00-0007  
of contract summaries for the neutral fact-finder :  
process for 2000 under Section 16-112(c) of the :  
Public Utilities Act.

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**REPLY BRIEF OF THE STAFF  
OF THE ILLINOIS COMMERCE COMMISSION**

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March 23, 2000

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**NOW COMES** the Staff of the Illinois Commerce Commission (“Staff”) through its attorneys, and submits its reply brief in this matter.

## **I. Introduction**

Initial briefs were filed in this matter by Staff, Commonwealth Edison Company (“ComEd”), Illinois Power Company (“IP”), Central Illinois Public Service Company and Union Electric Company (jointly “Ameren”), NewEnergy Midwest, L.L.C. (“NewEnergy”), Nicor Energy, LLC (“Nicor”), Peoples Energy Services Company (“PE Services”) and Illinois Industrial Energy Consumers (“IIEC”). This reply brief is Staffs response to the initial briefs of the parties where Staff found a response warranted. The absence of a response by Staff to any particular argument raised by any of the parties should not in any way be construed as acquiescence or approval by Staff.

## **II. Argument**

### **A. Level of Firmness**

In its initial brief, ComEd states that there are only two types of power, firm and non-firm. ComEd further alleges that Staffs definition of Firm as “Native Load Firm” is incorrect and that the definition of Marketer Firm as “interruptible, but with liquidated damages” is incorrect. ComEd IB pp. 2-3.

As Staff pointed out in its initial brief, the instructions in Section F.(b) set forth in ICC Staff Exhibit 1.0, Schedule B are slightly different than the language adopted by the Commission in Docket 98-0769. The parenthetical definition of “Firm” and “Marketer

Firm” was not included in the instructions adopted by the Commission in 98-0769. TR. 53-57 However, the changes proposed by Mr. Feerick are also different than the language adopted by the Commission. Mr. Feerick’s proposed language appears to combine “Native Load” Firm and “Marketer Firm.”

The pertinent language adopted by the Commission in Docket 98-0769 reads as follows:

In reporting the level of reliability, determine and define each level or category of reliability, e.g. “Native Load” Firm, Marketer Firm, Non-firm, and designate each with a capital letter, e.g. A, B, C, etc.. Also provide information regarding the delivery obligation of the selling entity.

Appendix B, p. 4

Staff would accept the language adopted by the Commission in Docket 98-0769 in lieu of Staffs proposed language for Section F.(b). However, Staff continues to recommend that Mr. Larson’s unopposed proposal to replace the word “delivery” with the word “performance” be adopted. Staff IB p. 10.

## **B. Unbundling Bundled Rate Contracts**

Several parties addressed issues regarding the unbundling of bundled rate contracts. IP and Nicor argue that reporting entities should not use the transition charge for 2000 for unbundling contracts for 2001. The contracts reported for the 2000 NFF process are for deliveries of power and energy on or after January 1, 2001. Staff has testified that the appropriate amount to use for transition charges when unbundling bundled rate contracts is the current transition charge approved for 2000, and has, in its

initial brief agreed with ComEd that the transition charge should be adjusted for the appropriate mitigation factor. ICC Staff Ex. 1 p. 8; Staff IB p. 8

Nicor witness Bailey recommended the use of 1999 day-ahead prices. Nicor Ex. 1, pp. 2-3. Mr. Bailey opined that the current transition charge is not reflective of the 2001 transition charge; and that the use of the 2000 transition charge to unbundle bundled prices for 2001 will distort the NFF's determination of market value, and perpetuate the 2000 market value into 2001. IP witness Hastings states that this proposal breaks the circularity problem. However, it causes another circularity problem in that the market value assumed becomes the market value result.

Staff continues to advocate its position that the use of the 2000 transition charge adjusted for the appropriate mitigation factor is the best alternative. Staff Ex. 2, p. 3, Staff IB p. 8 ComEd agreed with Staffs recommendation. ComEd IB p. 8

If the Commission accepts this position, Staff believes the proposed instructions should be modified. Staff recommends that the following language be added after the first sentence in the first paragraph of Section D. 3 of the instructions:

If the contract to be unbundled includes deliveries of power and energy after December 31, 2002, the current Commission-approved transition charge should be reduced if necessary to reflect the appropriate mitigation factor for years subsequent to 2002, as set forth in 220 ILCS 5/16-102.

Nicor and PE Services argue that contracts expressed in \$/kWh or \$/MWh should not be artificially split into separate capacity and energy price. Staff agrees that any such attempt would be arbitrary. Staff has not advocated that contracts stated only in \$/kWh should be split into an energy price (\$/kWh) and a capacity price(\$ kW); nor

does Staff believe that the proposed instructions require reporting entities to artificially split the energy only price in such contracts into separate capacity and energy prices. However, when contracts contain both a capacity charge and an energy price, both prices must be reported to the NFF. Additionally, contracts with a price stated in \$/kWh must be unbundled into a separate market value in \$/kWh, a delivery service cost in \$/kWh, and a transition charge in \$/kWh.

In its initial brief, IIEC takes issue with Section C.17 of Staffs Instructions, which reads in part as follows:

Also indicate whether the contract price reflects any consideration other than electricity and the price paid for electricity.

IIEC asserts that the use of the term “consideration” invites the submission of the subjective opinion of the entity submitting the contract summaries to the NFF.

IIEC IB p.3. It states that the submission of subjective opinions to the NFF is inconsistent with the requirements of Section 16-112(c), and calls the legality of the NFF process into question. IIEC argues that the language proposed by Staff is inconsistent with the Section 16-112(c) requirement that reporting entities

shall deduct from the contract price the charges for delivery services, including transition charges, applicable to delivery services customers in a utility’s service area, and charges for services, if any, other than the provision of power and energy or delivery services.

IIEC also complains that staffs proposed language is unclear and fails to define the term “consideration.”

As evidenced by Staffs testimony and initial brief in this proceeding, Staff is endeavoring to require the submission of as much objective information to the

NFF as is possible, consistent with the requirements of Section 16-112(c).

Staffs understanding is that because of the enactment of Article XVI of the Act, retail customers may enter into a number of types of contracts with retail electric suppliers-both electric utilities (operating either within or outside their “service areas,” as that term is defined in Section 16-102), and alternative retail electric suppliers.

Staff acknowledges that Section 16-112(c), in requiring the unbundling of bundled contracts, expressly mentions only the unbundling of “charges for services, if any, other than the provision of power and energy or delivery services.” If Staff were certain that “services” were the only additional thing of value that could be provided in a contract for power and energy (other than delivery services), Staff would not necessarily take exception to IIEC’s recommended change to Instruction C.17.

But that is not the case. Staff is unaware of any restriction on the provision (or receipt, for that matter) by an ARES of goods (e.g., energy conservation measures or electrical equipment) in a contract for power and energy. Similarly, contracts between retail customers and retail electric suppliers may contain promises which have value, or in-kind payment, or other forms of “consideration,” as that term is used in the law of contracts.

Given the possibility that such items of value will be included in retail electric contracts, Staff does not recommend that the Commission read the explicit term “services” as a limitation on the information which should be provided to the NFF. The more correct reading of the sentence IIEC quotes is in

context with the next sentence of Section 16-112(c), which confers broad authority on the Commission to set forth requirements concerning the form and content of contract summaries. Only with such a reading will the NFF be entitled to receive information concerning all of the value that each party to a retail electric contract is committing to provide to the other.

Staff thus stands by its recommended language for Instruction C.17 with one limited change. If the Commission believes that the term “consideration” is sufficiently vague to inject an unwarranted level of subjectivity into the reporting process, Staff suggests that the relevant sentence could be recast as follows:

Also indicate whether the contract price reflects any goods, services, promises, or things of value other than electricity and the price paid for electricity.

Only with language such as this will the Commission be assured that the NFF is given the appropriate level of information about contracts which involve more than electricity and the price paid for electricity. With this information, augmented by the Commission’s authority to audit under Section 16-112(j) and his own discretion to accord appropriate weight to the contracts reported to him, the NFF is in the best position to appropriately factor the data yielded by such contracts into his calculation of the market values of power and energy.

The IIEC also takes issue with Subparagraph D. 3. IIEC proposed that the following language be added as new Subparagraph (e)’ to Section D. 3 to clarify the unbundling issue:

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<sup>1</sup> Staff would note that Section D. 3, has only three subparagraphs (a), (b) and (c)



- (e) In unbundling bundled service retail contracts, the transition charge to be deducted shall be calculated on the basis of the contract rate in effect in the year preceding the date of the customer's eligibility for delivery service. If the contract rate was not in effect in the year preceding the customer's eligibility for delivery service the base rate in effect for the customer as of October 1, 1996 as adjusted pursuant to Section 16-102 of the Act, will be used to calculate the transition charge to be unbundling.

IIEC IB, p. 8

The language suggested by IIEC would require an individual transition charge to be calculated for any customer that had a discounted contract (i.e. a contract rate that is less than the tariffed rate) in effect in the year preceding the date the customer becomes eligible for delivery service. Staff's position in this case is that the transition charge in the Commission approved delivery service tariffs, adjusted by the appropriate mitigation factor, is the proper transition charge to be used to unbundle bundled rate contracts. Staff agrees with IIEC that to the extent the approved tariffs require an individual transition charge calculation the IIEC's language is appropriate. However, not every customer with a contract in effect in the year preceding the date the customer became eligible for delivery service is eligible for an individual transition charge calculation under the approved delivery service tariffs. For example, ComEd and IP's approved delivery service tariffs provide for individual transition charge calculations for customers with maximum peak demand greater than 3MW and 100KW respectively. Transition charges for customers with maximum peak demand that is less than those thresholds are calculated on a class basis. Some ComEd and Illinois Power customers that have maximum peak demand less

than the respective 3MW, or 100KW thresholds could have contracts in effect in the year preceding the date the customer is eligible for delivery service. In such cases the class transition charge would be used to unbundle those bundled rate contracts.

Staff believes that its instructions are consistent with Staffs above stated position. Therefore, Staff recommends that IIEC's proposed modification be rejected.

**C. The Commission should not impose mandatory directions on the NFF**

NewEnergy invites the Commission to provide specific direction to the NFF in a number of respects. Section III of its initial brief recommends that the Commission direct the NFF to

- recognize that wholesale contracts do not reflect the retail market
- calculate market values that reflect costs associated with load shaping
- calculate market values that reflect costs associated with load following, and
- require reporting entities to explain their contracts to the NFF.

As authority for the proposition that the Commission has broad authority to make recommendations to the NFF, NewEnergy quotes Sections 16-101A(b) and (d), and 16-112(c) of the Act. NewEnergy IB pp. 9-10 Of these, the only provision that directly addresses the Commission's authority with respect to the NFF process is Section 16-112(c), in which the Commission is simply given the authority to adopt orders setting forth requirements governing the form and content of contract summaries.

During the 1999 proceeding to determine requirements governing the form and content of contract summaries (Docket No. 98-0769), the Commission considered whether it may, or should state guidelines for the NFF's interpretation of collected data, and whether it may, or should state guidelines for the content and organization of the NFF's report. The Commission declined to determine the precise limits of its authority under Section 16-112, but found it appropriate "to express views as to 'guidelines' for the NFF's interpretation of the submitted data, calculation of market values and form and content of the report, so long as it is clear that these 'guidelines' are only suggestions, not mandatory directions imposed by the Commission." Order entered February 26, 1999, in Docket No. 98-0769, p. 11.

Staff sees no greater need for the Commission to test the limits of its Section 16-112 authority in 2000 than in 1999. The Commission's sole obligation under Section 16-112 is to establish requirements governing the form and content of contract summaries. As long as this requirement is met, Staff would not object to the establishment of appropriate guidelines in the same manner as in Docket No. 98-0769. Staff strongly recommends, however, that the Commission stop short of "directing" the NFF to perform his statutory duties in any particular way, based upon the record currently before it in this proceeding.

### **III. Conclusion**

WHEREFORE, for the foregoing reasons and those previously stated in our initial brief, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven G. Revethis", is written over a horizontal line.

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March 23, 2000

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**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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**PLEASE TAKE NOTICE** that on this 23<sup>rd</sup> day of March, 2000, we have filed with the Chief Clerk of the Illinois Commerce Commission, the Reply Brief of the Staff of the Illinois Commerce Commission, a copy of which is hereby served upon you.

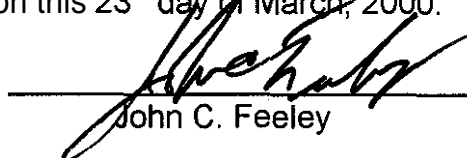
  
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that copies of the foregoing Notice of Filing, together with the documents referred to therein, were mailed to the actual parties on the attached Service List, by messenger, electronic mail, facsimile and/or first-class mail, proper postage prepaid from Chicago, Illinois, on this 23<sup>rd</sup> day of March, 2000.

  
John C. Feeley

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